STATE OF MICHIGAN

COURT OF APPEALS

PREDRAG PERIC,

Plaintiff-Appellee,

v

WENDY LEIGH PERIC,

Defendant-Appellant.

UNPUBLISHED
August 30, 2005

No. 259222
00-027426-DM
LC No. 00-027426-DM

Before: Saad, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant appeals by right from a circuit court order modifying custody of the parties' minor child and awarding primary physical custody to plaintiff. We reverse and remand for a new evidentiary hearing before a different judge.

When analyzing a child custody issue, this Court reviews a trial court's factual findings to determine whether they are against the great weight of the evidence, a trial court's discretionary rulings, such as custody decisions, for an abuse of discretion, and questions of law for clear legal error. MCL 722.28; *Thompson v Thompson*, 261 Mich App 353, 358; 683 NW2d 250 (2004), citing *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000); *Mogle v Scriver*, 241 Mich App 192, 196; 614 NW2d 696 (2000); *McCain v McCain*, 229 Mich App 123, 125; 580 NW2d 485 (1998). A trial court's factual findings are against the great weight of the evidence if they clearly preponderate in the opposite direction. *Thompson, supra* at 363; *Mogle, supra* at 196. Moreover, a court commits legal error if it incorrectly chooses, interprets, or applies the law. *Thompson, supra* at 358; *Phillips, supra* at 20.

In making a child custody determination, a trial court must make specific findings of fact regarding each of the twelve best interest factors enumerated in MCL 722.23 which must be considered when determining the best interests of a child. *Thompson, supra* at 363; *McCain, supra* at 124. Defendant challenges the trial court's factual findings with respect to best interest factors b, c, and l, and argues that the trial court legally erred regarding these factors.

Factor b requires the trial court to assess "[t]he capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any." MCL 722.23(b). Defendant argues that the trial court erred by analyzing the child's education under this factor rather than under factor h, MCL 722.23(h), involving "[t]he home, school, and community record of the child." Defendant

contends that factor b is limited to the child's "religious education." Nothing in MCL 722.23(b), however, limits the factor to religious education. Thus, it appears that factor b encompasses both secular and religious education.

Nonetheless, the trial court's findings regarding factor b were clearly erroneous. The court opined that the child would benefit from a smaller class size; therefore, plaintiff "is more sensitive to this child's emotional personality and social needs in choosing a school than defendant." No evidence was presented, however, that plaintiff chose the schools that he suggested because of Danilo's "emotional personality and social needs" as the trial court found. Christus Victor, where the child attended kindergarten, plaintiff testified that he researched several schools in his area, paying particular attention to whether the school was accredited, class size, teaching experience, whether it offered a hot lunch, the school's hours, and whether the school had received any violations. He chose Christus Victor because it met all of his criteria and was close to his house. Regarding St. Linus and St. Dunstan, plaintiff's proposed grade schools, plaintiff testified that both schools had above average MEAP scores and good scores on the Iowa Basic Skills Test. Plaintiff found these schools preferable to Ladd Lane Elementary School, in Hollister, CA, defendant's proposed grade school, because that school received a ranking of only five out of ten on the Academic Performance Index, had a significant number of English learners, appeared to have a significant percentage of students who were economically challenged, and only half of the students scored in the fiftieth percentile in the basic school subjects. Plaintiff never testified that he preferred the private, Catholic schools because the small class size would better suit Danilo's shy personality. Thus, the trial court erred by finding that plaintiff was more sensitive to the child's emotional, personality, and social needs in choosing a school than was defendant.

The trial court also erred by finding that defendant seemed more interested in convenience in selecting a school "particularly since she will not be the person who takes and picks up the child from school." On the contrary, defendant testified that she attended Ladd Lane public school in Hollister when she was raised there and felt that she received a good education. She also testified that she wanted her son to attend Ladd Lane Elementary School so that he could meet other children in the neighborhood and develop friendships early. Thus, the record belies the trial court's finding that defendant was concerned primarily with convenience. Indeed, defendant's testimony showed that she was concerned about Danilo's "emotional personality and social needs" in selecting a school.

Further, factor b required the trial court to consider the *capacity* of the parties to continue the child's education. At the time of the evidentiary hearing, Danilo was enrolled in a kindergarten that cost $140 a week. Plaintiff testified that he had been paying for plaintiff's preschool and kindergarten for the previous nine months. He also testified that his proposed grade schools, St. Linus and St. Dunstan, cost $3,300 and $2,600 a year, respectively. Evidence and testimony was also presented, however, that he was still living at home with his parents, that he had never lived on his own and supported himself, that his family helped him with his finances, that he earned $10 an hour or approximately $20,000 a year, that he earned only $12,500 in 2003, that he filed for bankruptcy after entry of the judgment of divorce because he was unable to pay his bills, and that he was $4,894.99 in arrears in child support, although he disputed that amount. Thus, regardless of the quality of the schools that plaintiff proposed, the evidence establishes that it is questionable whether he has the financial capacity to enroll his son

in either school. The trial court failed to ever consider or address plaintiff's capacity to provide the education that he planned to provide. Accordingly, the trial court's findings with respect to the child's secular education are against the great weight of the evidence.

Factor b also requires the trial court to assess the capacity and disposition of the parties regarding the child's religious education. The trial court's findings in this regard are also clearly erroneous. Although the trial court correctly found that defendant did not take Danilo to the Orthodox church in San Jose, plaintiff provided no evidence whatsoever that he took Danilo to an Orthodox church. In fact, plaintiff's efforts to raise Danilo in accordance with his Orthodox religion were not discussed at all during the evidentiary hearing. The only testimony that plaintiff presented regarding religion was that plaintiff enrolled Danilo for kindergarten at Christus Victor, a Catholic school, and that, in plaintiff's opinion, Orthodox and Catholicism are very similar. The fact that plaintiff enrolled Danilo in a Catholic school, however, is not the same as continuing the child's Orthodox education, which the court determined defendant failed to do. Given that the evidence showed that neither party continued Danilo's Orthodox religion, the trial court's finding that this factor favored plaintiff is against the great weight of the evidence.

Defendant further argues that the trial court erred by taking judicial notice that the Catholic and Orthodox religions are very similar. Although the court stated that it "should probably" take judicial notice that the two religions are similar, it does not appear from a review of the record that the court in fact did so. Thus, no legal error occurred.

Factor c, MCL 722.23(c), requires the trial court to assess "[t]he capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs." In analyzing this factor, the trial court placed inordinate weight on Danilo's medical and dental care while giving short shrift to the parties' financial abilities to care for the child. Although the court acknowledged that defendant earns at least four times plaintiff's annual income and that plaintiff is in arrears in child support, it failed to acknowledge several other factors, previously mentioned, which evidence plaintiff's vastly inferior financial situation. Moreover, plaintiff admitted that at the time of the evidentiary hearing, he had less than $1,000 to his name. On the other hand, defendant owns her own home and has exhibited long time financial independence. The trial court clearly erred by failing to accurately weigh the parties' financial capacities.

The trial court also failed to adequately consider defendant's contributions to her son's medical and dental care. Although defendant did not accompany Danilo and plaintiff to the oral surgeon's office for her son's first surgery, plaintiff took Danilo to at defendant's home immediately afterward so that defendant could care for him during the remainder of the week. Contrary to the trial court's finding that defendant was indifferent to Danilo's needs and that she did not want to "be there" for the child, defendant had also called the oral surgeon on the day of the surgery to talk to him about Danilo's care. She testified that she did not attend the extraction procedure because she and plaintiff were not getting along, and she did not want Danilo to see his parents argue or be upset at each other because he would already be frightened. Thus, it does not appear that defendant's absence during the surgery was because of indifference to her child's needs.

In addition, defendant was unable to be present for the second surgery because she was living in California at that time. She testified, however, that before the second extraction, she was concerned about Danilo's teeth and called a dentist in Hollister to complete the dental work. The dentist recommended having the oral surgeon in Michigan complete the work. She introduced into evidence an email to plaintiff explaining the work that Danilo needed. She thereafter gave plaintiff her insurance card and $500 to cover the up-front expense and telephoned plaintiff after the procedure to discuss it with him. Indeed, the second procedure was completed at her prompting. The trial court improperly failed to consider these circumstances.

Further, evidence was presented that defendant has taken Danilo to a doctor. Defendant and her fiancé, Eric Varga, testified that the last two times that they had Danilo for parenting time, they had to take him to a doctor because of a sinus infection and an ear infection. Defendant further testified that Danilo has a regular pediatrician in California. Again the trial court failed to consider this testimony and incorrectly stated that defendant "at first testified that she never took the child to the Doctor." Accordingly, because the trial court failed to give adequate weight to the parties' financial situations and failed to consider or minimized defendant's contributions to Danilo's medical needs, the court's findings regarding this factor are against the great weight of the evidence.

Factor l, MCL 722.23(l), allows a trial court to take into consideration, "[a]ny other factor considered by the court to be relevant to a particular child custody dispute." In considering this factor, the trial court opined that defendant disliked plaintiff's Eastern European heritage[1] and lifestyle. The trial court erred by injecting a cultural issue into this custody dispute. The trial court raised this issue on its own early on the second day of testimony. Although, the court questioned defendant and strongly implied the existence of a cultural issue, defendant unequivocally denied that any cultural problems existed. The only issue that defendant identified as being a cultural concern was her perception of how women were viewed in plaintiff's household. To defendant, who lived with the family, it appeared that plaintiff's mother was expected to "do everything around the house" and act as a "workhorse." Defendant testified that she did not want her son growing up to think that this is how women should be treated. Moreover the record reflects that the trial court appeared to dislike defendant's perception of how women are treated in plaintiff's household and arguably appeared confrontational regarding defendant's status as the "prime breadwinner," which it deemed "different culturally." Later in the proceeding, the trial court commented "popular American culture suggests that everybody divvy up housework, and everybody go to work." The court stated that it was "not part of that generation."

Our review of the record reflects that the trial court improperly concluded from plaintiff's and defendant's testimony that defendant disliked plaintiff's Eastern European lifestyle and heritage that she observed while living in the household and that defendant wanted to remove her son from that influence. Although the court admitted that "[n]o one actually said these things," it opined that defendant viewed the education level and behaviors of the household as "beneath her

[1] Plaintiff if Yugoslavian.

in some way." We simply see no such evidence to support that conclusion. The only concern that defendant expressed about the cultural difference in the household, however, was her perception that women were viewed as inferior and were expected to do all of the household chores. She did not express a concern about plaintiff's father simply because she thought that he was loud; her concern was that he was always yelling in an angry tone. In addition, she heard plaintiff's father strike plaintiff's mother on one occasion, and that plaintiff's mother admitted that he had hit her. Thus, the court erred by attributing defendant's concerns regarding plaintiff's household to cultural differences between the parties. In fact, included in the cultural heritage of plaintiff's family was Danilo's Orthodox religion, which defendant repeatedly testified she did not want to change. The trial court seemingly evidenced its own social cultural bias when it stated in its opinion that defendant "likes to be the breadwinner in the family," and that she "likes to work and leave the child responsibilities to the men in her life." Although the trial court stated that it was not judging defendant in this regard, a review of the record demonstrates the court's disdain for plaintiff's position as "the breadwinner" instead of a traditional mother who prefers child-rearing and domestic responsibilities. Thus, the trial court erred by injecting an alleged cultural issue into this dispute.

Defendant also argues that the trial court erred by relying on its own personal viewings of "Hellboy" and "Terminator" in rendering its findings of fact because the films were not admitted into evidence. Defendant cites no authority for its position. A party may not state a position without supporting authority and leave it to this Court to search for support for that position. *Badiee v Brighton Area Schools*, 265 Mich App 343, 378-379; 695 NW2d 521 (2005). Thus, this issue is waived.

Defendant also argues that the trial court's bias and prejudice require that further proceedings be assigned to a different judge. Generally, claims that a trial judge was biased must be preserved for appellate review by objecting to the trial court's conduct or otherwise raising the issue in the trial court. MCR 2.003(C); *Illes v Jones Transfer Co*, 213 Mich App 44, 56 n 2; 539 NW2d 382 (1995); *Meagher v Wayne State University*, 222 Mich App 700, 725; 565 NW2d 401 (1997). Because defendant did not raise this issue in the trial court, it is not preserved for appellate review, and this Court's review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999); *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003). Thus, reversal is required only if the error seriously affected the fairness, integrity, and public reputation of the judicial proceedings. *Carines, supra* at 763, 774; *In re Osborne (On Remand, After Remand)*, 237 Mich App 597, 601-602; 603 NW2d 824 (1999).

A party challenging a judge for bias must overcome a heavy presumption of judicial impartiality. *Cain v Dep't of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996). A judge may be disqualified under MCR 2.003(B)(1) if the judge evinces actual bias or prejudice against a party or attorney. *Id*. at 495; *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999). Where a judge forms an opinion during the course of a proceeding on the basis of facts introduced or events that occur during the proceeding, the opinion does not constitute bias or partiality unless there exists a "deep-seated favoritism or antagonism such that the exercise of fair judgment is impossible." *Id*.

Having reviewed the record, we are persuaded that the trial court evidenced partiality and bias and that the court's bias seriously affected the fairness, integrity, and public reputation of

the proceeding. Much of the reasoning supporting our conclusion is discussed above, however, the trial court also evidenced its bias regarding best interest factors not previously discussed. For example, with respect to factor f, MCL 722.23(f), involving the moral fitness of the parties, the court disregarded defendant's testimony regarding plaintiff's possession of pornographic magazines, stating, "There was no follow-up testimony on that and no proofs other than testimony." In addition, noticeably absent from the court's discussion of the morality of the parties is plaintiff's criminal conviction for soliciting an undercover sheriff for sexual purposes despite the fact that the conviction undeniably pertains to plaintiff's moral fitness. She also completely disregarded the testimony of a private investigator who confirmed defendant's suspicions that plaintiff spent the night at his fiancée's home and left Danilo with his parents. Although a court need not comment concerning every matter in evidence or declare acceptance or rejection of every position argued, *LaFleche v Ybarra*, 242 Mich App 692, 700; 619 NW2d 738 (2000), the trial court's pattern throughout the proceedings of disregarding, disbelieving, or minimizing factors negative to plaintiff evidences its bias.

In addition, in analyzing factor h, MCL 722.23(h), regarding the home, school, and community record of the child, the trial court further commented on defendant's position in her household. The court disbelieved defendant's reason for not waking Danilo up in the morning before she went to work. Defendant testified that Varga usually wakes Danilo up after she left for work because she wanted to avoid upsetting him because she had to leave and go to work. The court, however, found this reason incredible and found that this practice "is another indication of [defendant's] disdain for hands-on child care. It is simply easier for her to leave those responsibilities to her live-in partner." This finding further evidences the court's contempt for defendant's position as "the breadwinner instead of being a traditional mother."

The court also found that Danilo was not exposed to domestic violence in plaintiff's home and determined that factor k, MCL 722.23(k), regarding domestic violence, was equal as to both parties. The court made this finding despite defendant's testimony the she heard plaintiff's father strike plaintiff's mother, and that plaintiff's mother admitted to her afterward that this is what happened. The court opined that "[t]here's just not enough evidence to support that an incident, if it occurred, was not an isolated incident." Although plaintiff's mother testified that there had been no domestic violence in the past five years, she admitted to previous instances. In analyzing factor k, the trial court apparently disregarded that testimony.

Further, as indicated previously, the trial court characterized the video and testimony of private investigator Alekos Alexopoulos regarding plaintiff's spending the night at his fiancée's house as a "red herring." Defendant testified that Danilo told her that he often stays and sleeps at Regina Ventimiglia's house. Plaintiff had apparently denied that that was true, so defendant hired Alexopoulos to determine whether plaintiff had been truthful. Alexopoulos testified that he saw plaintiff's car parked in Ventimiglia's driveway at 2:23 a.m. and at 7:10 a.m. on September 18, 2004, contrary to plaintiff's testimony that he was home that night. Alexopoulos saw plaintiff exit Ventimiglia's house at 10:13 a.m. and get into his car. Alexopoulos videotaped his observations. The trial court regarded the video, however, and apparently disbelieved Alexopoulos' testimony as well, stating, "The Court looked at the video. The video quality is very poor, and essentially what it shows is a name plate, front doors, cars, and eventually Peter getting into a car." Thus, the court chose to ignore Alexopoulos' testimony, notwithstanding that he had no apparent reason to be untruthful and no emotional ties to the case. In addition, the fact

that plaintiff was seen exiting Ventimiglia's home without Danilo after having apparently spent the night there tended to support defendant's theory, repeatedly expressed during trial, that plaintiff's mother, who is only ten years older than defendant, was Danilo's primary caregiver while Danilo was in plaintiff's custody.

Because the trial court's apparent partiality to plaintiff impacted its findings on the best interest factors, we remand this case for a new evidentiary hearing before a different judge. The trial court's opinion evidences a "deep-seated favoritism" such that the exercise of fair judgment does not appear possible. *Wells*, *supra* at 391.

Given our disposition, we need not address defendant's remaining evidentiary issues.

We reverse and remand for further proceedings. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Jane E. Markey